Public Prosecutor v Sahari bin Usul and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–245–08 OF 2011, B-06A-1–08 OF 2011 AND B-06A-2–08 OF 2011
BALIA YUSOF, TENGKU MAIMUN AND HAMID SULTAN JJCA
24 DECEMBER 2013

Criminal Law — Penal Code — s 302 — Murder — First accused acquitted — Appeal against acquittal — Whether trial judge inconsistent in evaluating common intention in causing death of deceased — Whether appeal should be allowed — Second and third accused convicted and sentenced to death — Appeal against conviction — Whether trial judge correctly applied Radhi's direction — Whether trial judge justly and fairly considered defence case — Whether conviction safe — Whether appellate intervention warranted

Yusrizal bin Yusof ('the deceased') was arrested based on a complaint that he was having an affair with the complainant's wife. At the police station he had been assaulted. It was the prosecution's case that the complainant ('SP20') and the former employer of the deceased ('SP33') had not only witnessed the assault of the deceased but also participated in it. According to the prosecution evidence the deceased had then been escorted by two police officers (the second and third accused) for purported medical treatment in a car driven by SP33. When the car reached Ladang Caledonia ('the crime scene'), the deceased was asked to come out of the car and then shot dead in the head by the third accused in the presence of the second accused. The third accused claimed to have used a gun given to him by the first accused. The three police officers (the three accused) were charged with causing the death of the deceased,an offence punishable under s 302 of the Penal Code ('Code') read together with s 34 of the same Code. The trial judge called for the three accused to enter their defence. The first accused gave an explanation that he had lent a gun to the third accused, his senior officer, at his request, for the limited purpose of escorting the deceased for purported treatment. However, he denied any knowledge of what happened at the crime scene because he had not accompanied them in the car. At the close of the trial, the trial judge acquitted and discharged the first accused and convicted and sentenced to death the second and third accused. The prosecution filed an appeal against the acquittal and discharge of the first accused (the first appeal), while the second and third accused appealed against theirrespective convictions and sentences (the second and third appeals).The three appeals were heard together. In the first appeal the prosecution submitted that the trial judge was inconsistent in evaluating the element of common intention in causing the death of the deceased. It was the prosecution's contention that from the mere act of lending his gun to the third

accused, it could be inferred that the first accused had the common intention to use the gun to murder the deceased. The second accused argued, inter alia, that the trial judge erred by deciding that he had committed the offence by his mere presence at the scene of the crime. The second accused also took a constitutional challenge on the charge having been framed in Bahasa Malaysia when such a Penal Code in the Malay language was not available. The third accused submitted, inter alia, that the trial judge erred in deciding there was common intention between all the accused persons to commit murder and that the trial judge erred in failing to consider the his defence of self-defence.

Held, dismissing all the three appeals:

(1) The lending of the gun by the first accused could not attract s 34 of the Penal Code, when there was no evidence to show that the first accused knew or ought to have known that there was a scheme to murder the deceased. The trial judge had considered the issue meticulously in his judgment and there were no valid reasons to disturb the finding of facts and conclusion in respect of the first accused (see paras 10–11).

(2) There were no merits in respect of the constitutional challenge mounted by the second accused. It is settled law that the court would be slow in lending its hands to assist the complaining party when there was no miscarriage of justice (see paras 14–16).

(3) There was no merit in the complaint relating to the evidence of SP20 and SP33, which implicated the second and third accused to the offence and the issue of s 34 of the Penal Code. There was ample corroborative evidence and sufficient circumstantial evidence to drive home the charge of murder. Further, the trial judge had meticulously considered the defence of the second accused before concluding that it neither created a reasonable doubt in the mind to attract acquittal nor warranted a lesser charge (see paras 17–18 & 20).

(4) It is well-established that in cases of murder where there was no dispute as to the killing by the accused, motive was not an essential feature to drive home the charge. In the instant case, SP33 had witnessed the incident and the conduct of the second and third accused after the killing strictly attached culpability and stood to be the corroborative element for mens rea at common law. In the circumstances there were no appealable errors in the findings of the trial judge in respect of the second accused (see paras 22–23).

(5) As for the third appeal, SP33's evidence had attached liability and the trial judge had sufficiently dealt with and dismissed the defence of the third accused. It was clear that there was sufficient material to support the charge and the view taken by the trial court on the relevant issues was a reasonable view of the evidence on record. In the circumstances, it was

clear that the court had followed *Radhi*'s direction, and rightly applied the maximum evaluation and the beyond reasonable doubt test. As such, the decision was safe and did not warrant appellate intervention (see paras 25–27).

[Bahasa Malaysia summary

Yusrizal bin Yusof ('si mati') telah ditangkap berdasarkan aduan bahawa dia mempunyai hubungan sulit dengan isteri pengadu. Di balai polis dia telah diserang. Adalah kes pendakwaan bahawa pengadu ('SP20') dan bekas majikan si mati ('SP33') bukan hanya menyaksikan serangan si mati tetapi juga turut serta dalam kejadian tersebut. Menurut keterangan pendakwaan si mati kemudian dibawa oleh dua orang pegawai polis ('tertuduh kedua dan ketiga') untuk tujuan rawatan perubatan dalam kereta yang dipandu oleh SP33. Apabila kereta itu sampai di Ladang Caledonia ('tempat kejadian'), si mati telah diminta untuk keluar dari kereta dan kemudian ditembak mati di kepala oleh tertuduh ketiga dalam kehadiran tertuduh kedua. Tertuduh ketiga mendakwa telah menggunakan pistol yang diberikan kepadanya oleh tertuduh pertama. Ketiga-tiga pegawai polis (ketiga-tiga tertuduh) telah didakwa menyebabkan kematian si mati, kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama-sama dengan s 34 Kanun yang sama. Hakim bicara memanggil ketiga-tiga tertuduh untuk membela diri mereka. Tertuduh pertama memberi penjelasan bahawa dia telah meminjamkan pistol kepada tertuduh ketiga, pegawai kanannya, atas permintaan tertuduh ketiga, untuk maksud terhad mengiringi si mati untuk rawatan yang dikatakan. Bagaimanapun, dia menafikan apa-apa pengetahuan tentang apa yang berlaku di tempat kejadian kerana dia tidak menyertai mereka di dalam kereta. Pada akhir perbicaraan, hakim perbicaraan melepaskan dan membebaskan tertuduh pertama dan menyabitkan dan menghukum mati tertuduh kedua dan ketiga. Pihak pendakwaan memfailkan rayuan terhadap pembebasan dan pelepasan tertuduh pertama (rayuan pertama), manakala tertuduh kedua dan ketiga membuat rayuan terhadap sabitan dan hukuman masing-masing (rayuan kedua dan ketiga). Tiga rayuan didengar bersama. Dalam rayuan yang pertama pihak pendakwaan berhujah bahawa hakim perbicaraan adalah tidak konsisten dalam menilai unsur niat bersama dalam menyebabkan kematian si mati. Ia adalah hujahan pihak pendakwaan bahawa dari perbuatan meminjamkan senjatanya semata-mata kepada tertuduh ketiga, boleh disimpulkan bahawa tertuduh pertama mempunyai niat yang sama untuk menggunakan senjata untuk membunuh si mati. Tertuduh kedua berhujah, antara lain, bahawa hakim perbicaraan terkhilaf dengan memutuskan bahawa dia telah melakukan kesalahan itu dengan kehadiran semata-mata di tempat kejadian jenayah. Tertuduh kedua juga mengambil cabaran Perlembagaan atas tuduhan yang telah dirangka dalam Bahasa Malaysia apabila Kanun Keseksaan tidak tersedia dalam Bahasa Melayu. Tertuduh ketiga mengemukakan, antara lain, bahawa hakim perbicaraan terkhilaf dalam memutuskan terdapat niat bersama antara semua

tertuduh untuk melakukan pembunuhan dan bahawa hakim perbicaraan terkhilaf apabila gagal mempertimbangkan pembelaan mempertahankan dirinya.

Diputuskan, menolak ketiga-tiga rayuan:

(1) Peminjaman senjata oleh tertuduh pertama tidak boleh menarik s 34 Kanun Keseksaan, apabila tidak ada bukti yang menunjukkan bahawa tertuduh pertama tahu atau sepatutnya mengetahui bahawa terdapat satu skim untuk membunuh si mati. Hakim perbicaraan telah mempertimbangkan isu dengan teliti dalam penghakimannya dan tidak ada alasan yang sah untuk mengganggu dapatan fakta dan kesimpulan berkenaan dengan tertuduh pertama (lihat perenggan 10–11).

(2) Tiada sebarang merit berkenaan dengan cabaran Perlembagaan yang ditimbulkan oleh tertuduh kedua. Adalah undang-undang tetap bahawa mahkamah akan menjadi perlahan dalam campur tangan untuk membantu pihak yang mengadu apabila tiada salah laksana keadilan (lihat perenggan 14–16).

(3) Tidak terdapat merit dalam aduan berhubung dengan keterangan SP20 dan SP33, yang mengaitkan tertuduh kedua dan ketiga dengan kesalahan dan isu s 34 Kanun Keseksaan. Terdapat keterangan menyokong yang cukup dan keterangan mengikut keadaan yang memadai untuk memutuskan tuduhan membunuh. Selanjutnya, hakim perbicaraan telah dengan teliti mempertimbangkan pembelaan tertuduh kedua sebelum menyimpulkan bahawa ia tidak membentuk keraguan yang munasabah dalam minda untuk menyebabkan pembebasan ataupun mewajarkan pertuduhan yang lebih kurang (lihat perenggan 17–18 & 20).

(4) Adalah mapan kes-kes pembunuhan yang mana tidak ada pertikaian tentang pembunuhan oleh tertuduh, motif bukanlah salah satu ciri penting untuk menyampaikan pertuduhan. Dalam kes ini, SP33 telah menyaksikan kejadian dan kelakuan tertuduh kedua dan ketiga selepas pembunuhan dengan ketat mengikat kebersalahan dan disabitkan menjadi elemen menyokong untuk *mens rea* pada *common law*. Dalam keadaan itu tidak ada kesilapan yang boleh dirayukan dalam penemuan hakim perbicaraan berkenaan dengan tertuduh kedua (lihat perenggan 22–23).

(5) Bagi rayuan ketiga, keterangan SP33 ini telah mengikat liabiliti dan hakim perbicaraan telah cukup menangani dan menolak pembelaan tertuduh ketiga. Adalah jelas bahawa terdapat material yang mencukupi untuk menyokong pertuduhan dan pandangan yang diambil oleh hakim perbicaraan tentang isu-isu yang berkaitan adalah pandangan yang munasabah daripada keterangan rekod. Dalam keadaan ini, adalah jelas

bahawa mahkamah telah mengikut petunjuk kes *Radhi*, dan dengan betul menggunakan penilaian maksimum dan ujian melampaui keraguan munasabah. Oleh itu, keputusan itu adalah selamat dan tidak mewajarkan campur tangan mahkamah rayuan (lihat perenggan 25–27).]

Notes

For cases on s 302 of the Penal Code, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1815–1931.

Cases referred to

Attan bin Abdul Gani v PP [1970] 2 MLJ 143b (refd)
Aung Thun & Anor v PP and another appeal [2014] 1 MLJ 784, CA (refd)
Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (folld)
Munuswamy Sundar Raj v PP [2013] 5 MLJ 48, CA (refd)
Natcha Dabkaew v PP (K-05–177–07 of 2012) (unreported) (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328, CA (refd)
Pramod Mandal v State of Bihar [2004] 4 LRI 24, SC (refd)
Shahabuddin and another v State of Assam Cr A No 629 of 2010, SC (refd)
SM Summit Holdings Ltd & Anor v PP and another action [1997] 3 SLR 922, HC (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Criminal Procedure Code s 152
Federal Constitution art 7
National Language Acts 1963/67 s 7
Penal Code ss 2, 34, 300, 302, 323

Appeal from: Trial No 46–1 of 2006 (High Court, Alor Setar)

Tan Sri Dato' Abdul Aziz bin A Rahman (Zati Farahiyah with him) (Nik Saghir & Ismail) in Criminal Appeal B-06A-1–08/2011 for the appellant.
G Ravishankar (R Shankar Gandhi & Assoc) in Criminal Appeal B-06A-2–08/2011 for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal B-05–245–08/2011 for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal B-06A-1–08/2011 for the respondent.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal B-06A-2–08/2011 for the respondent.
J Kuldeep Kumar (Kuldeep Kumar & Co) in Criminal Appeal B-05–245–08/11 for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] Three appeals came before us for hearing on 2 September 2013 and on the same day we heard them and dismissed all the appeals. My learned brother Balia Yusof bin Hj Wahi JCA and learned sister Tengku Maimun bt Tuan Mat JCA have read the draft judgment and approved the same.

INTRODUCTION

[2] Three police officers were charged for the murder of Yusrizal bin Yusof. They were (a) Sahari bin Usul (the first accused), (b) Ailias bin Yahaya (the second accused), (c) Saiful Azlan Shah bin Abdullah (the third accused).

[3] The learned trial judge called for defence and at the end of the defence acquitted and discharged the first accused and convicted and sentence to death the second and third accused. The prosecution has filed appeal No B-05–245–2011 against the acquittal and discharge of the first accused. The second accused has filed appeal No B-06A-1–08–2011 and the third accused appeal No B-06A-2–08–2011 against conviction and sentence.

[4] The charge against the three accused to be read with s 34 of the Penal Code reads as follows:

> Bahawa kamu bersama-sama pada 13 Januari 2006, antara jam 10.00 malam hingga 11.30 malam, di Ladang Caledonia KM22, Jalan Kuala Lumpur, Kuala Selangor, Batu Arang, di dalam daerah Gombak dalam negeri Selangor Darul Ehsan, bagi tujuan mencapai niat bersama kamu, telah melakukan kesalahan membunuh, iaitu menyebabkan kematian ke atas YUSRIZAL BIN YUSUF (Warganegara Indonesia Pas port No: M556433) dan dengan itu, kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.

[5] The learned trial judge in her 32 pages meticulous judgment has documented the facts and evidence and given her grounds for the decision. The case for the prosecution essentially revolves in finding of facts. There is no dispute that the three accused were involved leading to the death of the deceased. The true question in such appeals is whether the learned judge has correctly applied *Radhi*'s direction and given proper consideration to the defence story before acquitting or convicting the accused.

[6] It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing, if the court orders an acquittal or conviction it cannot

be set-aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record (see *Pramod Mandal v State of Bihar* [2004] 4 LRI 24 (SC); *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328).

[7] The issues raised in this case are related to whether the learned trial judge has justly and fairly considered the defence case and whether the conviction is safe.

BRIEF FACTS

[8] SP 20 had complained that the deceased was having an affair with his wife. SP20 had some well wishers who were instrumental for the arrest of the deceased. On the fatal day at the police station, SP20 and SP33 had witnessed the assault of the deceased in the police station and they also had assaulted the deceased. The first accused at the request of the three accused had given a gun for a limited purpose of escorting the accused purportedly for treatment. The first accused did not join the second and third accused who took the deceased for the said purported treatment in the car driven by SP33. Subsequently, it was the evidence of SP33 that the deceased was asked to come out of the car at Ladang Caledonia where the deceased was shot dead in the head at close range by the third accused, and the second accused was with him at the material time. The body of the deceased was recovered later. It must also be noted that SP20 and SP33 were charged for a lesser offence under s 323 and was sentenced.

THE FIRST APPEAL (NO B-05–245 OF 2011)

[9] The petition of appeal filed by the public prosecutor in essence reads as follows:

> The learned Judge was inconsistent in evaluating the element of common intention in causing the death of the deceased.

[10] On the facts of the case, it is difficult to fathom how the lending of the gun by the first accused per se can attract s 34 of the Penal Code when there was no evidence to show that the first accused knew or ought to have known that there was a scheme to murder the deceased. In his defence, the first accused had given an explanation as to who he lent the gun. He was asked by the second accused, who was his senior, for the gun. He did not offer the gun and he was not aware that his gun was used as the second accused had substituted the three spent bullets with fresh bullets from the armoury. Neither the second nor the third accused had informed the first accused of what happened at Ladang

Caledonia. The learned trial judge had considered the issue meticulously in the judgment and the conclusion at pp 1037–1038 of the appeal record on this issue reads as follows:

> Could an inference be made that the first accused by the mere act of lending his gun to the third accused possess the common intention to use the gun to murder the deceased? From the circumstances, I have reasonable doubts that the first accused possessed such an intention. The first accused had also testified he only knew of the deceased's death on the day he was arrested.

[11] We do not see any valid reasons to disturb the finding of facts and conclusion in respect of the first accused. In conclusion, the prosecution's appeal is dismissed.

THE SECOND APPEAL (NO B-06A–1–08 OF 2011)

[12] The petition of appeal of the second accused in essence can be summarised as follows:

(a) the learned judge erred in failing to fully consider and evaluate the evidence and defence case.

(b) the learned judge erred in failing to hold SP33 as an accomplice whose evidence need to be taken with care.

(c) the second accused was a police officer discharging his official duty and there was no evidence that the scheme to murder the deceased was taken at the Sg Pelong Police Station. The second accused had no relation to the deceased, SP20 or SP33.

(d) the learned judge erred by deciding that the second accused had committed the offence by a mere presence at the scene when the shots were fired.

(e) the charge was unlawful, null and void as it contravenes s 2 of the Penal Code, s 152 of the Criminal Procedure Code, art 7 of the Federal Constitution and s 7 of the National Language Acts 1963/67.

[13] The learned counsel for the appellant took a constitutional challenge on the charge having been framed in Bahasa Malaysia when such a Penal Code in the Malay language is not available. The learned counsel's submission on this issue reads as follows:

> 23. I submit that the offence cited in the charge as 'Seksyen 302 Kanun Keseksaan dan Seksyen 34 Kanun Keseksaan' are unknown to law and therefore the charge against OKT2 is not valid. The authoritative law is Section 302 of the Penal Code read together with s 34 of the Penal Code (Act 574). The Penal Code (Act 574 is an

Act of Parliament relating to criminal offences. The Penal Code was enacted in 1936 (FMS Cap 45) and revised in 1997. It is clearly stated in Section 1 thereof that the Act may be cited as the Penal Code and s 2 thereof states as follows:

> 2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof of which he shall be guilty within Malaysia.

[14] Similar issues have been raised in other cases and the court did not find merit. It is well settled that if the procedure and practice is well established notwithstanding it is fraught with technicalities courts will be slow in lending its hands to assist the complaining party when there is no miscarriage of justice (see *Goi Ching Ang v Public Prosecutor* [1999] MLJ 507). In addition, there is a duty and obligation of the court more so by the apex court to ensure justice not only for the accused but also for the victim. On this issue the Indian Supreme Court in *Shahabuddin and another v State of Assam* Cr A No 629 of 2010, the Supreme Court of India had this to say:

> Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned President Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subserved. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interests of the society as well.

(see *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827; *Natcha Dabkaew v Public Prosecutor* (K-05–177–07 of 2012)).

[15] Similar sentiments as expressed in *Shahabudin*'s case was also expressed in the decision of *SM Summit Holdings Ltd & Anor v Public Prosecutor and another action* [1997] 3 SLR 922 of Singapore by Chief Justice Yong Pung How in the following words:

> … Different tests apply for both. In the former category, it is a case where the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations, and the exclusion of evidence would in fact undermine judicial integrity in allowing such alleged offenders get away …

[16] After having given much consideration to the learned counsel in respect of the constitutional challenge, we are of the considered view that it has no merits.

[17] We also do not find any merit in the complaint relating to the evidence of SP20 and SP33 which implicated the second and third accused to the offence and the issue of s 34 of the Penal Code.

[18] There was ample corroborative evidence and/or sufficient circumstantial evidence to drive home the charge of murder. In this respect there was sufficient merit in the submission of the learned deputy public prosecutor who said as follows:

(a) SP33 and SP20 were not interested witnesses and were not accomplice as their involvement in the incident was passive, unlike that of the other accused who played active roles resulting in the death of the deceased.

(b) SP33 was the ex-employer of the deceased and a civilian summoned to the police station by the first accused, and was merely following instructions.

[19] In *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b, the law on corroboration was succinctly stated to cover the facts of instant case. Sharma J had this to say:

> The law as to corroboration as enunciated by the various authorities may be summarised thus:
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> It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear:
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> (1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.
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> (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

(4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

(5) Corroboration must be in material particulars but it is not necessary that the whole prosecution story or all material particulars should be corroborated.

(6) Corroborative evidence required for accepting the testimony of an accomplice need not by itself conclusively establish the guilt of the accused. It is sufficient if it is a piece of circumstantial evidence which tends to connect the accused with the crime with which he is charged.

(7) Though a trap-witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon his evidence without corroboration. His evidence is not a tainted one; it would only make a difference in the degree of corroboration required rather than the necessity for it.

(8) Corroboration need not be by direct evidence. It may be by circumstantial evidence in which case the rule relating to proof from circumstantial evidence would apply and the circumstance must be consistent with the innocence of the accused against whom the circumstance is offered as evidence.

(9) There must be corroboration in one or more material particulars but that does not mean in every particular or detail. Corroboration, as the grammatical meaning of the word itself implies, means only support, or in other words, an assurance of truth which is lent to the evidence of the accomplice or the complainant by other evidence. It does not mean that the whole evidence given by the accomplice (or complainant) must be repeated wholly or in parts by witnesses other than the accomplice (or the complainant).

(10) The minimum corroboration which the law ordinarily requires of the evidence of an accomplice is evidence of at least one material fact pointing to the guilt of the accused person. The weight of such corroborative evidence which is necessary depends on the particular facts and circumstances of the case.

[20] In the instant case there is no plausible explanation proffered by the second and the third accused for the killing of the deceased. The court had meticulously considered the second accused's defence and came to a conclusion, in essence that it did not create a reasonable doubt in the mind to attract acquittal and/or the circumstances warranting a lesser charge. The relevant part of the judgment reads as follows:

> The synchronised, mutually supporting roles played by the second and third accused, from the time the deceased was brought into the station, to the time the fatal shots were fired, leads this court to the irresistible inference that the shooting of the deceased was not done in self defence but the execution of a deliberate plan by the second and third accused.

[21] The learned counsel strenuously argued that the issue of motive was relevant to connect the second accused and asserted that the prosecution has failed to do so. A passage from *Ratanlal & Dhirajlal's Law's of Crimes* was relied and that paragraph reads as follows:

> Motive, though not a sine qua non for bringing the offence of murder at the door-step of the accused is, nevertheless, relevant and important on the question of intention. The absence of proof of motive should put the court on its guard to examine the evidence led by the prosecution to bring home the charge to an accused with great care before its acceptance.

[22] It is well established in cases of murder where there is no dispute as to the killing by the accused motive is not an essential feature to drive home the charge. In the instant case, SP33 had witnessed the incident and the conduct of the second and third accused after the killing strictly attaches culpability and stand to be corroborative element for mens rea, at common law. However, under s 300 of the Penal Code mens rea is not an essential element and the section finds a person culpable based on the nature of injury itself and further culpability is presumed when s 34 is made applicable to person who did not strike the fatal blow. Section 34 was considered in the case of *Aung Thun & Anor v Public Prosecutor* [2014] 1 MLJ 784 where the Court of Appeal through Hamid Sultan bin Abu Backer JCA made the following observation:

> [9] It is now well established that to invoke section 34 it is not a sine qua non for the prosecution to prove pre-concert or pre-planning in the true sense, (see *Lee Kwai Heong & Anor v PP* [2006] 2 MLJ 528). It will be sufficient if the prosecution can establish that the appellants were in the place and took part in the crime and/or had nexus to the crime. Section 34 is not a substantive law but it is procedural in nature favouring the prosecution such as that of presumption. The effect of the application of section 34 is that once it is invoked in the charge itself and evidence is led to show that the appellants were involved in the crime, the appellants will be required to speak of their innocence or non involvement in the crime or that at the material time of the crime they have disassociated from the crime. Nothing more, (see *Ravindran a/l Ramasamy v Public Prosecutor* [2013] 4 MLJ 665; [2013] 4 AMR 502; *Phrueksa Taemchim v Public Prosecutor* [2013] 6 MLJ 808; [2013] 5 AMR 338).
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> [11] In addition we must say the learned counsel's argument that the prosecution ought to have shown motive for the murder has no merits on the facts of the case. Motive may be essential if it is a case where the prosecution is relying on circumstantial evidence. Unlike common law offence of murder, the statutory offence of murder or manslaughter based on ss 299 and 300 of the Penal Code

strictly does not require motive as an element to be proved. If at all evidence of motive is introduced by the prosecution where direct evidence is available for homicide then it is only meant to strengthen the probative force of the prosecution case and/or to negate the defence of self defence or provocation, etc at the earliest stage.

[23] We have gone through the petition of appeal of the second accused and contrasted with the finding of the judge and the conclusion. We find no appealable errors. In consequence, the second accused's appeal is dismissed.

THE THIRD APPEAL (NO B-06A–2–08 OF 2011)

[24] The petition of appeal of the third accused in essence reads as follows:

(a) the learned judge erred in deciding that a prima facie case had been made out and the third accused had mens rea to murder the deceased.

(b) the learned judge erred in deciding that the head shot was made at close range.

(c) the learned judge erred in deciding common intention between all the accused persons to commit murder.

(d) there was doubt as to the identity of the weapon thereby causing a break in the chain of evidence.

(e) SP33's evidence was contradictory and the learned judge erred in deciding that the contradictions did not affect SP33's credibility, when he was an accomplice.

(f) the learned judge erred in failing to adequately consider the third accused's defence of self-defence.

(g) there was no common intention between all the accused.

[25] We do not find any merits in the appeal. SP33 evidence attaches liability and the learned judge has dealt with the issue and did not accept the third accused version.

[26] We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; *Munuswamy Sundar Raj v Public Prosecutor* [2013] 5 MLJ 48).

[27] We are of the considered view it is a safe decision and appellate intervention is not warranted and the appeal has no merit. For reasons stated above, the third accused's appeal is dismissed.

We hereby order so.

All three appeals dismissed.

Reported by Kohila Nesan